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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOSEPH FALCONE, PETITIONER

v.

INTERNAL REVENUE SERVICE, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a pro se nonattorney litigant is entitled to an attorney fee award under 5 U.S.C. §552(a)(4)(E)?

2. Whether a pro se attorney litigant is entitled to an attorney fee award under 5 U.S.C. §552(a)(4)(E)?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

JOSEPH FALCONE,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent./

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Joseph Falcone, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered August 8, 1983.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Michigan is reported at 535 F. Supp. 1313 (D.C. Mich. 1982), attached as Exhibit A.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at ___ F.2d ___, No. 82-1377, (6th Cir. August 8, 1983), attached as Exhibit B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act, 5 U.S.C. §552(a)(4)(E) provides in relevant part:

> (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

STATEMENT

In June of 1978, Petitioner filed a Freedom of Information Act request with the Internal Revenue Service (Respondent) for the release of certain documents. The

Respondent denied the request on the basis that the requested documents were exempt as deliberative under 5 U.S.C. §552(b)(5). The Petitioner filed an Administrative Appeal, but was again denied release of the documents by Respondent. Consequently, Petitioner filed in the Federal District Court for the Eastern District of Michigan for de novo review pursuant to 5 U.S.C. §552(a)(4)(B) of the Freedom of Information Act.

In April of 1979, the parties filed a Motion and Cross Motion for Summary Judgment thereby bringing the matter up to the court for early consideration and determination. Oral arguments were presented and supplemental briefs were filed. Ultimately, on October 30, 1979, the District Court ordered that certain requested documents be released.

On December 13, 1979, the Respondent appealed the decision of the Federal District Court to the Sixth Circuit Court of Appeals. The District Court stayed its Order pending appeal. On June 1, 1981, the Respondent filed a Motion to Dismiss its appeal. The Motion was granted by the Sixth Circuit Court of Appeals on November 18, 1981.

In December of 1981, the Petitioner filed a renewed Petition in the Federal District Court for the recovery of reasonable attorney fees and other litigation costs reasonably incurred in the suit pursuant to 5 U.S.C. §552(a)(4)(E). An earlier Petition for Attorney Fees brought by Petitioner had been denied only for the reason that the Respondent's then pending appeal rendered the Petition premature.

In March of 1982, the United States District Court for the Eastern District of

Michigan denied the recovery on the basis that the Respondent had not acted unreasonably in refusing to release the requested documents. The Petitioner appealed, and the United States Court of Appeals for the Sixth Circuit held that pro se Freedom of Information Act plaintiffs who happen to be attorneys are not entitled to attorney fees.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning whether federal courts should adopt the practice of awarding attorney fees to prevailing pro se nonattorney and/or attorney litigants who bring claims under the Freedom of Information Act (FOIA). The traditional "American Rule" is that unless reimbursement is specifically authorized by statute, federal courts will not order losing litigants to pay reasonable attorney fees. Alyeska Pipeline Serv. Co. v. Wilderness Society,

421 U.S. 240 (1975). Although the FOIA contains such authorization, the statute does not expressly answer the question whether a successful pro se litigant may recover a fee as compensation for legal work that he has performed. 5 U.S.C. §552(a)(4)(E). It is not surprising, therefore, that the various Circuits of the United States Court of Appeals have reached conflicting conclusions on this issue. The First, Third, Fourth, Eighth and Tenth Circuits have refused to award attorney fees to pro se litigants.[1/]

1/ Lovell v. Snow, 637 F.2d 170 (1st Cir. 1981) (Civil Rights Attorney Fees Award Act (CRAFAA)); Crooker v. United States Dept. of Justice, 632 F.2d 916 (1st Cir. 1980) (FOIA); Cunningham v. FBI, 664 F.2d 383 (3rd Cir. 1981) (FOIA); White v. Arlen Realty & Dev. Corp., 614 F.2d 387 (4th Cir.), cert. denied, 447 U.S. 923 (1980) (Truth in Lending Act (TILA)); Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981) (Privacy Act); Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981) (CRAFAA); Davis v. Parratt, 608 F.2d 717 (8th Cir. 1979) (CRAFAA); Burke v. United States Dept. of Justice, 432 F. Supp. 251 (D. Kan. 1976), aff'd, 559 F.2d 1182 (10th Cir. 1977) (FOIA).

However, the District of Columbia Circuit has consistently allowed such awards.[2/] Several Circuits have given different answers depending on whether the pro se party was an attorney or a nonattorney.[3/] The Petitioner contends that the District of Columbia Circuit has expressed the better view on whether a pro se nonattorney plaintiff may recover attorney fees under the FOIA, and that the District of Columbia Circuit and Fifth Circuit have

2/ Crooker v. United States Dept of Treasury, No. 80-1412 (D.C. Cir. Oct. 23, 1980) (FOIA); Cox v. United States Dept. of Justice, 601 F.2d 1 (D.C. Cir. 1979) (per curiam) (FOIA); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977); Quinto v. Legal Times of Washington, Inc., 511 F. Supp. 579, (D.D.C. 1981) (Copyright Act).

3/ Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980) (CRAFAA); Hannon v. Security Nat'l Bank, 537 F.2d 327 (9th Cir. 1976) (TILA); Crooker v. United States Dept. of the Treasury, 634 F.2d 48 (2d Cir. 1980) (FOIA); Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981); Cazalas v. United States Dept. of Justice, Nos. 82-3445, 82-3510 (5th Cir. July 22, 1983).

expressed the better view for attorneys appearing pro se. It is further contended that should this Court decide not to resolve the conflict in the Circuits, the District of Columbia Circuit and Fifth Circuit will be the only places such attorney fees cases will be brought.

1. THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT AS TO WHETHER 5 U.S.C. §552(a)(4)(E) ENTITLES PRO SE LITIGANTS TO ATTORNEY FEE AWARDS.

One must first examine the statute's language in order to determine its meaning. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). The FOIA statute authorizes the court to assess "reasonable attorney fees and other litigation costs reasonably incurred" to a plaintiff who has "substantially prevailed." Although the term "attorney fees" standing by itself is unambiguous, the courts have differed in their interpretation of the phrase "reasonable attorney fees and other litigation costs

reasonably incurred." Consequently, the courts are divided on the issue of whether pro se litigants are entitled to recover attorney fees. The District of Columbia Circuit was confronted with this issue in Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977). The Cuneo court held that the words "reasonably incurred" modify only the term "litigation costs" and not the entire phrase "reasonable attorney fees and other litigation costs." Cuneo at 1366, citing Holly v. Acree, 72 F.R.D. 115 (D.D.C. 1976). Under this interpretation of §552(a)(4)(E), the court concluded that plaintiffs need not have actually incurred attorney fees to be within the scope of this provision and that pro se litigants should be permitted to recover attorney fees. According to the court, this reading of the provision better served the policy of the FOIA in that it removed barriers to the vindication of FOIA rights. Cuneo at

1366.

The Cuneo court's approach to the issue of whether pro se FOIA litigants are eligible for attorney fees has been followed in subsequent cases in that Circuit Court and by a District Court in Connecticut. See Cox v. United States Department of Justice, 601 F.2d 1 (D.C. Cir. 1979); Jones v. United States Secret Service, 81 F.R.D. 700 (D.C.C. 1979); and Marschner v. Department of State, 470 F. Supp. 196 (D. Conn. 1979).

The Fifth Circuit in Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981), was faced with construing language from the Privacy Act's attorney fees provision, which is virtually identical to the FOIA §552(a)(4)(E). The Fifth Circuit's interpretation of that language, which represents the antithesis of the Cuneo court's approach, resulted in the denial of attorney fees to a pro se litigant. According

to the Barrett court, "reasonably incurred" modifies the entire phrase "reasonable attorney fees and other litigation costs." Barrett at 1089. In addition, the Barrett court characterized the awarding of attorney fees, where none have been incurred, as a penalty against the government. The court further stated that it was not persuaded that the policies and purposes of the Privacy Act or the FOIA are necessarily furthered by granting attorney fees to pro se litigants.

An important distinguishing feature in Barrett, however, was that the plaintiff was a prison inmate. Of paramount importance to the court was their concern to avoid making FOIA litigation a "cottage industry" for federal prisoners. Barrett at 1089, citing Crooker v. United States Dept. of the Treasury, 634 F.2d 48 (2nd Cir. 1980).

The First Circuit and the Tenth Circuit have also denied attorney fees to pro se litigants by similarly interpreting the language of §552(a)(4)(E) as requiring that attorney fees actually be incurred. Crooker v. United States Department of Justice, 632 F.2d 916 (1st Cir. 1980); Burke v. United States Department of Justice, 432 F. Supp. 251, aff'd, 559 F.2d 1182 (10th Cir. 1977). Although the Fifth Circuit refused to grant pro se attorney fees in Barrett, the court left open the possibility that pro se attorneys may be eligible for reimbursement for their legal expenses. Barrett at 1089. More recently, in Cazalas v. United States Department of Justice, ___ F.2d ___, Nos. 82-3445, 82-3510, (5th Cir. July 22, 1983), the Fifth Circuit held that a pro se attorney who obtained documents under the FOIA and Privacy Act, was entitled to an

award of attorney fees. This was an issue of first impression in the Fifth Circuit, and the Cazalas court succinctly disposed of four government arguments opposing the award of attorney fees to attorneys appearing pro se. The first argument urged in Cazalas was that the policy of access to government records is not forwarded by an award since an attorney proceeding pro se will not have out-of-pocket legal expenses that will deter him or her from pursuing an FOIA action in the courts. As a result such an award would amount to punishment against the government because the appellant has not incurred comensurable expenses. Cazalas at 6. The court disagreed and stated that she "incurred precisely the sort of expenses that might deter a less determined litigant." Cazalas at 6. The court went on to say that the award is not a punishment in the sense of being a

windfall but amounts to a punishment only to the extent the government should be reprimanded for unreasonably failing to comply with its own governing laws. The second argument put forward by the government was that the FOIA statute is designed to encourage litigants to consult with objective attorneys so as to avoid unnecessary litigation. The court found little evidence to support this assertion and stated that:

> "on the contrary the fee provision is designed to promote vigorous advocacy on behalf of citizens seeking government information ... [and that] Citizens are more likely to be successful in obtaining desired documents in the face of government intrasigence when they have secured the services of one trained in the art of advocacy." Cazalas at 6.

The appellant being an attorney provided precisely the type of determined representation Congress sought to make available to all FOIA litigants. The third argument

put forth by the government was that attorneys will abuse the FOIA by bringing litigation solely to generate fees. The court disagreed with this because if the government had a colorable basis in law to withhold the documents, most courts would be reluctant to grant the fees under their discretionary power. Cazalas at 6. Finally, the government contended the court had already refused to grant fees to pro se nonattorney litigants and there is no basis for reimbursing attorneys for income lost as a result of their pro se status. The court also disagreed with this argument making the distinction between attorneys and nonattorneys stating that "the work foregone is the same nature as that actually performed and that such is not the case for nonattorney pro se litigants." Cazalas at 7.

The Second Circuit in Crooker v. United States Department of the Treasury, 634 F.2d 48 (2nd Cir. 1980), implicitly concurred with the District of Columbia Circuit's decision in Cuneo by finding that pro se FOIA litigants may be entitled to attorney fee awards in certain circumstances.

The Third Circuit in Cunningham v. FBI, 664 F.2d 383 (3rd Cir. 1981), considered whether a pro se nonattorney litigant was eligible for an award of attorney fees under the FOIA. Defining the term "attorney fees" to be unambiguous, the court nevertheless conceded that the phrase "reasonable attorney fees and other litigation costs reasonably incurred" was amenable to more than one interpretation. The Cunningham court acknowledged the District of Columbia Circuit in Cuneo that interpreted the phrase as requiring that

only litigation costs, and not attorney fees, need be "reasonably incurred." However, the Cunningham court deemed the Fifth Circuit's approach in Barrett construing "reasonably incurred" as modifying both litigation costs and "reasonable attorney fees" to be more compatible with the statutory language. According to the Cunningham court, the legislative history of the provision did not suggest that Congress enacted §552(a)(4)(E) to promote litigation. Rather, the court stressed that Congress' express concern was simply to remove obstacles to legitimate claims. Cunningham at 387. The Petitioner contends that the Cunningham court's denial of attorney fees to pro se litigants can not be reconciled with accepted principles of statutory construction and is inconsistent with the policy concerns expressed by Congress in enacting the FOIA.

2. THE LEGISLATIVE HISTORY OF 5 U.S.C. §552(a)(4)(E) CLEARLY MANDATES ATTORNEY FEE AWARDS TO PRO SE LITIGANTS.

From the preceding discussion it is clear that the meaning of the FOIA statute is open to various interpretations. Since "statutory language is not dispositive of the issue," it is necessary to examine the legislative history to assert whether the Congress intended to authorize recovery of legal fees by pro se litigants. Crooker v. United States Department of the Treasury, 634 F.2d 48 (2nd Cir. 1980). Unfortunately, the committee reports and Congressional debates on the FOIA do not mention pro se parties. Evidently, Congress did not anticipate the problem. In situations like this, the appropriate next step is predicting what Congress would have done if it had considered the question, "starting from the areas where the

legislative intent is readily discernable, and projecting to fair and reasonable corrolaries of that intent for the specific issue before us". Montana Power Co. v. Federal Power Commission, 445 F.2d 739 (D.C. Cir. 1970), cert. denied, 400 U.S. 1013 (1971). After performing this analysis, Petitioner contends one will conclude that Congress' intent can only be carried out by allowing prevailing pro se attorney and nonattorney litigants to recover attorney fees.

Congress had two primary reasons for breaking from the American Rule that parties must pay their own attorney fees. The first, and most important consideration, was to encourage the vindication of legal rights through the judicial process. The statute authorizes an award of attorney fees in areas where Congress has established important national policies whose

success depends on significant individual enforcement efforts. S. Rep. No. 854, 93rd Congress, 2nd Session 18 (1974). In enacting the FOIA, Congress created a disclosure statute which depended on suits by private litigants for enforcement. When private enforcement proved ineffective, measures were adopted to curb government abuse of the Act by removing the chief barriers to individual litigation. What constituted a violation of the Act was defined with greater precision; punitive measures against intentional misconduct were created; and attorney fees became available. Indeed, these measures have been so successful in encouraging the pursuit of FOIA rights that courts now fear plaintiff abuse. Specifically, some courts are afraid in the case of pro se plaintiffs, that fee awards under the FOIA will give rise to a "flood" of burdensome

litigation and underserved "windfall" awards. Crooker v. U.S. Department of the Treasury, 634 F.2d 48 (2nd Cir. 1980). Inexplicibly, plaintiff's abuse does not appear to be a problem when the plaintiff is represented by a lawyer. Luzaich v. United States, 435 F. Supp. 31 (D. Minn. 1977). It is ironic, but in categorically refusing to award attorney fees to pro se litigants, the courts are refusing to apply a statutory provision aimed at encouraging FOIA suits to a class of plaintiffs on whom the provision is having the desired effect. S. Rep. No. 854, supra, at 16. The public benefit is real, and their legal activity is deserving of compensation.

The Petitioner contends that, allowing pro se FOIA litigants to recover attorney fees will not result in windfall recoveries and other abuses. Stringent criteria must be satisfied to justify an award of attor-

ney fees to the FOIA plaintiff who has substantially prevailed. The plaintiff must still demonstrate an absence of commercial incentive, appropriate interest in the information sought, reasonable government non-compliance, and an indication of a public interest. S. Rep. No. 854, supra at 18. In properly applying this statute, the courts have the power to control potential abuse by pro se plaintiffs without shielding the government from the payment of a fee award in a proper case. The courts are eminently capable of balancing the four factors in arriving at a decision which reflects the equity of the individual case. The application of these factors will serve to determine whether attorney fees are appropriate and will insure that the interest of the FOIA will be served without denying the award to deserving plaintiffs.

The second reason Congress enacted the FOIA was to induce potential defendants to comply with the law. When the defendant is forced to pay the plaintiffs attorney fees, he incurs a cost over and above that normally encountered in civil litigation. This additional cost can help to deter violations of the law, especially in cases where the actual damages are non-existent. This is the case in actions brought under the FOIA, where the plaintiff is merely seeking release of government held information, as this involves no claim for damages at all. As the Senate Committee Report, at 17, explained "if the government had to pay the fees each time it lost a case, ... it would be much more careful to oppose only those [cases] where it had a strong chance of winning."

Petitioner contends that both of Congress' purposes in allowing attorney fee

awards will be inadequately served if awards are confined to litigants who actually hire a lawyer. First, contrary to some court's contention, allowing litigants to recover the reasonable fees of retained attorneys, will not, by itself, insure judicial vindication of individual rights. There are many potential litigants of moderate means who may not hire a lawyer to represent them even when awards of attorney fees are available. These people realize that legal fees are only given to litigants who win. They may be unwilling to risk employing a lawyer and gambling on winning the case, because if they lose they will owe their lawyer a significant amount of money. Congress realized this as the Senate Report, at 18, states that even "the simplest FOIA case, according to testimony, involves legal expenses of over $1,000.00 ...". For these poor people, the only

choices are either litigating pro se or not litigating at all. If potential pro se parties can not expect compensation for the time spent on the cases even if they win, they face an additional disincentive to file the suit.

Awarding attorney fees to pro se litigants furthers Congress' intent to facilitate a vindication of individual rights through litigation. It is important to remember that the purpose of the FOIA attorney fee statute is to encourage citizens to seek justice in the courtroom. The FOIA attorney fee statute was not designed to insure that a large number of citizens could obtain legal representation; hiring an attorney is merely a means of accomplishing the ultimate goal of the statute. To the extent of awarding attorney fees to pro se litigants helps to achieve that end, therefore, it should be

considered authorized by the statute.

Denying an award to a pro se litigant also fails to implement the second Congressional purpose underlying attorney fees, that is, encouraging compliance with the law. This negative effect is most obvious when a violation has already occurred, a lawsuit has been filed, and the defendant is debating whether to settle the claim or continue resisting. If the defendant knew that his pro se opponent could not collect legal fees, he may delay in the hope that his opponent would become discouraged and drop the suit. If the pro se party could collect attorney fees, the potential cost to the defendant of resisting the claim would rise dramatically, and these costs might discourage delaying tactics by the violator. By increasing the cost of violating the statute, moreover, the awards would provide a disincentive for violating

the law in the first instance.

Neither the statute's language nor its legislative history manage an interpretation that precludes an award of attorney fees to pro se litigants. To the contrary, the purpose for which Congress authorized awards of attorney fees in FOIA cases is not served by limiting the class of plaintiffs eligible for the award. Congress' intent can be effected, therefore, by interpreting "attorney fees" to allow prevailing pro se attorney and nonattorney litigants compensation for the legal work that they have performed.

3. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN DENYING ATTORNEY FEE AWARDS TO PRO SE ATTORNEY LITIGANTS.

In Falcone v. IRS, the United States Court of Appeals for the Sixth Circuit enumerated four basic reasons why it denied attorney fees to the Petitioner.

Those four reasons are: (1) that claimants who proceed without legal counsel should not be entitled to compensation for legal costs which were never incurred; (2) even assuming pro se litigants should receive attorney fees there would be difficult problems of proof in calculating the amount of such an award; (3) the FOIA provision for attorney fees was intended to encourage claimants to seek legal advice which might help prevent unnecessary litigation; and (4) the fear of using the Act solely as a way to generate fees rather than vindicate personal claims. Each of these reasons were discussed and disposed of in Cazalas v. United States Department of Justice, ___ F.2d ___, nos. 82-3445, 82-3510 (5th Cir. July 22, 1983).

The first two reasons can be disposed of easily. Most opponents of pro se attorney fees begin by arguing that pro

se litigants do not deserve compensation. They argue that since pro se litigants spend no money on and incur no debts for legal advice, it follows that awarding them a fee is simply an unjustifiable windfall. Crooker v. United States Department of the Treasury, 632 F.2d 916 (1st Cir. 1980). Any out-of-pocket expenses incurred, such as printing and court fees are recoverable as part of the cost award. See Crooker v. United States Department of the Treasury, 632 F.2d 916 (1st Cir. 1980). Opponents also argue that there is no meaningful standard to calculate the amount of an award. These arguments are unpersuasive because they adopt an artificially narrow definition of the pro se litigant's expenses. Pro se parties invest time instead of money in preparing their cases. Their time has a recognized value, which is measured by the cost of foregoing other

opportunities in order to pursue the lawsuit. Cazalas at 7. This "opportunity cost" is defined by economists as the value of goods that must be given up to produce something. R. Waud, Economics, 24 (1980). In Petitioner's case, and in other FOIA cases, the goods given up is time, either from work or from leisure. Since the value of leisure is generally thought of as the value of what it is being given up for, namely work, the value of the time that a pro se litigant spends on his case equals the value of the same number of hours worked at his normal job. Pro se parties should, therefore, normally receive that amount as an attorney's fee. The Fifth Circuit, in Cazalas v. United States Department of Justice, ___ F.2d ___, Nos. 82-3445, 82-3510 (5th Cir. July 22, 1983), stated that approximating fees is relatively simple where the pro se litigant is

an attorney. The Second Circuit, in Crooker v. United States Department of the Treasury, 634 F.2d 48 (2nd Cir. 1980) has implied in dicta that opportunity costs may be the crucial determinant of pro se cases.

The third argument necessarily assumes that pro se litigants would be a burden on the judicial system and hence should not be encouraged. This argument logically leaves much to be desired. It condemns pro se attorney fees because they encourage litigation, the very purpose for which Congress enacted the attorney fees statute under the FOIA. If granting legal fees to pro se plaintiffs will induce more of them to pursue their claims in court, that is reason to be pleased, not distressed. It is not altogether apparent, moreover, that pro se attorneys do an unsatisfactory job of pleading their causes. See Cazalas v.

United States Department of Justice, ___ F.2d ___, Nos. 82-3445, 82-3510 (5th Cir. July 22, 1983); Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). In addition many nonattorney pro se parties, such as law students and paralegals, have had sufficient legal training to make them reasonably well qualified to conduct a lawsuit. Hannon v. Security National Bank, 537 F.2d 327 (9th Cir. 1976).

The real objection seems to be the fourth reason, namely, that awarding attorney fees to pro se attorneys would generate a flood of litigants in the federal courts who are more interested in legal fees than in vindicating any substantive right. If so, there are several reasons not to be overly concerned. Attorney fees can be recovered only if the plaintiff wins the case, and people without a legitimate claim and reasonable chance of

victory are not likely to file suit. In addition, judicial screening mechanisms already exist for weeding out frivolous claims before substantial judicial resources have been expended; since many pro se parties are indigent, they file their claims in forma pauperis, a form of pleading that allows the court to waive filing fees. 28 U.S.C. §1915(a)(1976). The statute allowing the waiver of fees also allows the judge to dismiss the complaint without even a preliminary hearing if he thinks it is frivolous. 28 U.S.C. §1915(b) (1976). For those parties who do not proceed in forma pauperis, the filing fees represent a significant out-of-pocket expense and should discourage plaintiffs from filing long-shot claims. Claims arising from these hurdles that prove meritless can always be dismissed at the demurer or summary judgment stages.

These mechanisms, therefore, already exist to screen out frivolous cases brought by prison inmates as was the concern of Barrett and its progeny.

If the claims are meritorious, on the other hand, they deserve a hearing in court. That hearing should not be discouraged by arbitrary denials of legal expenses when such expenses are authorized by law and when Congress has indicated its desire to encourage judicial vindication of the rights protected by the FOIA statute. Furthermore, simply to entitle pro se litigants to receive attorney fees does not necessarily mean the pro se party will receive those fees in a particular case. At that point, it would be at the discretion of the Court to either award the fees or not. "Where the government has a colorable basis in law for withholding the documents, most courts will

be reluctant to grant fees." Cazalas at 6.

CONCLUSION

The Petitioner contends that federal courts should adopt the practice of awarding attorney fees to prevailing pro se non-attorney and attorney litigants who bring claims under the attorney fee provision of the FOIA. Analysis of the legislative history of the statute shows that awarding fees to parties who represent themselves in the courtroom furthers the purpose for which the statute was enacted, and, therefore, would probably have been favored by Congress had it expressly considered the issue. An opportunity cost approach to evaluation provides the Court with a reasonable method for determining the amount of compensation that a nonlawyer or lawyer pro se litigant should receive, namely, an amount equal to what he would

earn working the same number of hours at his normal job.

Since self representation may be the only reasonable option for many to seek to protect their rights, the courts should remove any unnecessary barriers to the exercise of that option. Litigants have a statutorily guaranteed right, to represent themselves in federal court. 28 U.S.C. §1654 (1976). We are a nation that prides itself on providing equal justice for all. If some citizens feel compelled, for whatever reason, to seek their justice in person, we should not discourage them from doing so.

Furthermore, it is time that the conflict among the various United States Courts of Appeal as to whether pro se nonattorney and attorney litigants can be awarded attorney fees should be resolved. If the issue is not resolved by this Court,

any future pro se nonattorney cases will simply be filed in the District Court of Columbia Circuit, and any future pro se attorney cases will be filed in the District of Columbia Circuit or the Fifth Circuit. The Petitioner prays that in order to establish uniformity among the United States Courts of Appeal in the application of the laws which grant the award of attorney fees, it is respectfully submitted that this Petition for Writ of Certiorari be granted and the question be finally settled.

JOSEPH FALCONE
In Pro Per
1400 American Center
Southfield, MI 48034
(313) 355-5000

Dated: November 7, 1983

CERTIFICATE OF SERVICE

Joseph Falcone certifies that on November 2, 1983 three copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was mailed to Michael L. Paup, Esq., Chief Appellate Section, U. S. Department of Justice, Washington, D.C. 20530, Attorney for Respondent.

JOSEPH FALCONE

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH FALCONE,

Plaintiff,

Civil Action No.
78-72763

v.

INTERNAL REVENUE SERVICE,

Defendant.

FILED
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U.S. DISTRICT COURT
EAST. DIST. MICH.

OPINION DENYING PLAINTIFF'S
PETITION FOR ATTORNEY FEES

Plaintiff, Joseph Falcone ("Falcone"), is a tax attorney. In June of 1978 he requested of the Internal Revenue Service ("IRS"), defendant, copies of a General Counsel Memorandum ("GCM"), number 36846, a face sheet to the memorandum, and a one-page staff comment. The request was made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and was denied under exemption (b)(5) covering deliberative documents. Falcone made the request on behalf of a client but the exigency of the client's problem required a decision before I could review the agency's denial. Nevertheless, Falcone in his own name, acting as a private attorney general, pursued the release in this court.

In the course of the litigation, the Internal Revenue Service released the cover sheet and on October 30, 1979, I granted Falcone's motion for summary judgment and ordered IRS to release the GCM. IRS appealed the decision but later withdrew the appeal following the decision of the United States Court of Appeals for the D.C. Circuit that GCMs were not exempt under the FOIA. See, Taxation With Representation Fund v. Internal Revenue Service, 646 F.2d 666 (D.C. Cir. 1981).

Before me now is Falcone's motion for attorney fees under 5 U.S.C. § 552 (a)(4)(E). That section provides:

> The Court may assess the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Despite its rather liberal language, the section has consistently been read more narrowly. Like the more recent and more generally applicable Equal Access to Justice Act of 1980,[1] Section 552(a)(4)(E) has been limited to cases in which the government's action was unreasonable. In addition, under the FOIA, the court must find that the public was benefited by the release and that the plaintiff's request was not motivated by a commercial interest.

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[1] Pub. L. No. 96-481, § 201 et seq., 94 Stat 2325-2330 (1980), particularly as it amends 28 U.S.C. § 2412.

The source of the extra-textual criteria is the Senate's version of the section and its accompanying comments. That version would have specifically required the court to:

> ... consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the Government's withholding of the records sought had a reasonable basis in law.

120 Cong.Rec. 17045-47 (1974). Even though this language was deleted from the final version, almost every court that has interpreted the section has relied on the Senate's discussion. The U.S. Court of Appeals for the Sixth Circuit has not addressed the Act but the D.C. Circuit adopted the analysis in Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977); the Fourth Circuit in Nix v. United States, 572 F.2d 998 (4th Cir. 1978); the Fifth Circuit in Blue v. Bureau of Prisons, 570 F.2d 529 (5th Cir. 1978); and the Ninth Circuit in Polynesian Cultural Ctr. v. N.L.R.B., 600 F.2d 1327 (9th Cir. 1979). The D.C. Circuit has thoroughly explained the rationale in its opinion in Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704 (D.C. Cir. 1977), and I will not repeat it here.

Applying the criteria in this case I find that an award of attorney fees would be inappropriate and Falcone's petition must be denied. I have no difficulty in finding that Falcone substantially prevailed in this suit. During the pendency of the suit, IRS released the cover sheet, undoubtedly only because of the suit, and I ordered IRS to release the GCM, the principal object of the request. The only document Falcone did not obtain was the one-page comment.

I also find that the release of the GCM did serve a substantial public benefit. As I stated in my opinion granting summary judgment:

> Obviously, GCM's are widely recognized within the IRS as statements of agency interpretation for the tax questions for which they are prepared. Despite this, up to now they have not been disclosed to the public. It is precisely this "secret law" which the FOIA was designed to eliminate.

Falcone v. Internal Revenue Service, 479 F.Supp. 985, 988 (E.D. Mich. 1979). Further evidence of their value is the fact that Prentice-Hall is currently publishing GCMs as part of its Tax Reporter Service.

Although Falcone is a tax lawyer, I find that he had no commercial interest in the information. In sworn answers to the interrogatories of the IRS, he stated that the suit was not brought on behalf of any client and that no client stood to gain from the release of the particular GCM he sought. Without a paying client, it is difficult to see how Falcone stood to gain financially.

I do not award the fee, however, because I find that the IRS did not act unreasonably in denying Falcone's request. Rereading my opinion granting summary judgment, I recall that the decision was difficult. In fact, after my decision in this case, at least one other district court decided that GCMs were exempt from disclosure. See, Cliff v. Internal Revenue Service, 496 F.Supp. 568 (S.D.N.Y. 1980). Also,

before these decisions, no court had published an opinion on the issue and it was not until 1981 that a circuit court finally considered whether GCMs were exempt. See, Taxation With Representation Fund v. Internal Revenue Service, 646 F.2d 666 (D.C. Cir. 1981) (ordering release).

For these reasons I find the IRS had reason to believe its GCMs might be exempt and therefore I must deny Falcone's petition. An appropriate order follows.

John Feikens
Chief United States District Judge

April 7, 1982

A TRUE COPY
CLERK
By Deputy Clerk

EXHIBIT B

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1377

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH FALCONE,
Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 8, 1983

Before: LIVELY and CONTIE, Circuit Judges; and SILER, District Judge.*

CONTIE, Circuit Judge. In *Wolfel* v. *United States*, — F.2d —, No. 82-3372 slip op. (6th Cir. filed July 11, 1983) we held that a *pro se* Freedom of Information Act (FOIA) plaintiff who is not an attorney is not entitled to attorney's fees. Today we hold that the same rule applies to *pro se* FOIA plaintiffs who also happen to be attorneys.

The plaintiff, a tax attorney, obtained the release of certain Internal Revenue Service documents, *Falcone* v. *Internal Revenue Service*, 479 F.Supp. 985 (E.D. Mich. 1979), and

---

* The Honorable Eugene E. Siler, Jr., U.S. District Judge for the Eastern and Western Districts of Kentucky, sitting by designation.

then petitioned for attorney's fees pursuant to 5 U.S.C. § 552 (a)(4)(E.) The district court found that the plaintiff was a prevailing party but denied the petition for fees on the basis that the IRS had not acted unreasonably in refusing to release the requested documents. *Falcone* v. *Internal Revenue Service*, 535 F.Supp. 1313 (E.D. Mich. 1982). The plaintiff now appeals. Since this case involves a *pro se* FOIA plaintiff, our recent decision in *Wolfel* requires that we first consider the government's contention that the plaintiff's *pro se* status precludes the award of any fees.

Several courts which have denied attorney's fees to *pro se* non-lawyer FOIA plaintiffs have raised but not decided the issue of whether such litigants who also happen to be attorneys should be treated differently. *See, e.g., Cunningham* v. *F.B.I.*, 664 F.2d 383, 385 n.1 (3d Cir. 1981); *Barrett* v. *Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982). The District of Columbia Circuit has held that a *pro se* attorney plaintiff can recover attorney's fees under FOIA because such litigants "enhance the public interest by bringing the government into compliance with the law." *Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977).[1] *Cuneo* is not persuasive authority, however, because the District of Columbia Circuit has used this same analysis to justify its subsequent holding that *all pro se* FOIA plaintiffs are eligible for attorney's fees. *Cox* v. *United States Department of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979). This circuit has declined to adopt this rule, and has instead held that *pro se* FOIA plaintiffs generally are not entitled to recover attorney's fees. *Wolfel, supra.* Whereas the proper inquiry under the District of Columbia Circuit's rule is whether a *pro se* plaintiff who would otherwise be entitled to fees should be denied those fees "simply because

[1] The plaintiff in *Cuneo* was also represented without compensation by his law partners but the court's reasoning appears to apply broadly to all *pro se* attorney plaintiffs. *See Cox* v. *United States Dept. of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979).

he happens to be an attorney," *Cuneo*, 553 F.2d at 1366, the question before us, in light of *Wolfel*, is whether fees should be awarded simply because the *pro se* plaintiff also happens to be an attorney.

We hold that the same reasons which led us, and the majority of the other circuits,[2] to deny attorney's fees to *pro se* non-lawyer FOIA plaintiffs apply with equal validity to *pro se* attorney plaintiffs.

The award of attorney's fees to successful FOIA plaintiffs was intended to relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government. *See Wolfel*, — F.2d at —, slip op. at 5-6; *Barrett*, 651 F.2d at 1089-90. Thus, we held in *Wolfel* that those claimants who chose to proceed without legal representation were not entitled to be compensated for legal costs which were never incurred.[3] The same reasoning applies to *pro se* plaintiffs who are also attorneys since no legal costs are incurred in such cases. Since the plaintiff never assumed the burden which Congress intended to ease, an award of fees is inappropriate.

A second reason for denying fees to *pro se* FOIA plaintiffs is that the provision for attorney's fees was intended to encourage potential claimants to seek legal advice before commencing litigation. *Barrett*, 651 F.2d at 1089-90. It was hoped that the retention of legal counsel might help to prevent unnecessary litigation. *Id.* An attorney who represents himself in litigation may have the necessary legal expertise but is unlikely to have the "detached and objective perspective" necessary to fulfill the aims of the Act. *Cf. White* v.

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[2] *See* cases cited at *Wolfel* v. *United States*, —— F.2d at ——, slip op. at 4-5.

[3] We note that neither this case nor *Wolfel* involves the situation where the plaintiff obtains the services of a legal services organization or an attorney on a contingency basis. We express no view on the availability of attorney's fees in such cases.

Arlen Realty & Development Corp., 614 F.2d 387, 388 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980) (denying attorney's fees to *pro se* attorney plaintiff in Truth-in-Lending Act case.)

A final concern in denying attorney's fees to *pro se* plaintiffs is the fear of creating a "cottage industry" for claimants using the Act solely as a way to generate fees rather than to vindicate personal claims. *Wolfel*, — F.2d at —, slip op. at 6, citing *Crooker* v. *United States Dept. of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980). Although *Crooker* involved a plaintiff who was a prisoner, the fear that the United States could become an unwilling "client" for inactive attorneys is not irrational. *See White*, 614 F.2d at 388. We do not believe that Congress intended to so subsidize attorneys without clients.[4]

The Second Circuit has suggested that *pro se* plaintiffs, presumably including attorneys, could recover fees if they showed that prosecution of their FOIA claim diverted them from income-producing activity. *Crooker* v. *Dept. of Treasury*, 634 F.2d 48, 49 (2d Cir. 1980). Although such a rule may negate the fear of inactive attorneys bringing FOIA claims solely to generate fees, it would produce difficult problems of proof. In any event, the rule is unsatisfactory because it does not address the other reasons which have led us to deny fees to *pro se* litigants.

In *Wolfel*, we rejected the minority view that successful *pro se* FOIA plaintiffs should be awarded attorney's fees despite the fact that the public may have benefitted from the actions of those litigants. The fortuitous fact that such a

[4] In *Ellis* v. *Cassady*, 625 F.2d 227 (9th Cir. 1980), attorney's fees were awarded to *pro se* attorney litigants in a civil rights case. The case is distinguishable on the ground that the attorneys were defendants in the case. "[They] did not seek out a chance for *pro se* litigation to compensate for an inactive practice; they were forced to defend against frivolous claims made by a plaintiff who is apparently bent on endless litigation." *Id.* at 231. Also, fees are awarded under 42 U.S.C. § 1988 to defendants only to deter frivolous litigation, a purpose that is not found in 5 U.S.C. § 552(a)(4)(E).

FOIA plaintiff is also an attorney makes no difference. Both a client and an attorney are necessary ingredients for an award of fees in a FOIA case.

The judgment of the district court is AFFIRMED.

Office - Supreme Court, U.S.
FILED
FEB 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-741

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH FALCONE, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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JOSEPH FALCONE, PETITIONER

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INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a *pro se* litigant who is also an attorney, seeks attorney's fees under the Freedom of Information Act, 5 U.S.C. 552, as compensation for pursuing litigation under the FOIA.

1. Petitioner, a tax attorney, brought a *pro se* suit in the United States District Court for the Eastern District of Michigan under the FOIA, seeking to compel the Internal Revenue Service to produce certain documents. Petitioner obtained some of the documents he sought and then moved for attorney's fees under the FOIA (see 5 U.S.C. 552(a)(4)(E)). Pet. App. 1a-2a. The district court denied attorney's fees because it concluded that the IRS "did not act unreasonably in denying [petitioner's] request" for the documents (*id.* at 4a) and indeed "had reason to believe" that the documents petitioner sought "might be exempt" from disclosure under the FOIA (*id.* at 5a).

The court of appeals affirmed on the ground that 5 U.S.C. 552(a)(4)(E) does not authorize an award of attorney's fees to a *pro se* litigant. The court noted that in *Wolfel* v. *United States*, 711 F.2d 66 (1983), it had held that a *pro se* litigant who is not an attorney is not eligible for attorney's fees under the FOIA (Pet. App. 6a). The court ruled that there was no reason to treat petitioner differently merely because of the "fortuitous fact that [he] is also an attorney" (*id.* at 9a-10a). "[T]he same reasons which led us * * * to deny attorney's fees to *pro se* non-lawyer FOIA plaintiffs apply with equal validity to *pro se* attorney plaintiffs" (*id.* at 8a (footnote omitted)).

The court of appeals explained its first reason as follows (Pet. App. 8a (footnote and citations omitted)):

> The award of attorney's fees to successful FOIA plaintiffs was intended to relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government. Thus, we held in *Wolfel* that those claimants who chose to proceed without legal representation were not entitled to be compensated for legal costs which were never incurred. The same reasoning applies to *pro se* plaintiffs who are also attorneys since no legal costs are incurred in such cases. Since the plaintiff never assumed the burden which Congress intended to ease, an award of fees is inappropriate.

The court of appeals also noted that a principal purpose of the attorney's fee provision of the FOIA was to "encourage potential claimants to seek legal advice before commencing litigation" in order to "prevent unnecessary litigation" (Pet. App. 8a). The court reasoned that when an attorney represents himself he does not bring to the case the " 'detached and objective perspective' necessary to fulfill the aims of the Act" (*ibid.* (citation omitted)).

Finally, the court of appeals noted that allowing *pro se* plaintiffs to collect attorney's fees could create a "cottage industry" of litigants who use the attorney's fee provisions of the FOIA and similar statutes as a means of generating income. The court stated that "the fear that the United States could become an unwilling 'client' for inactive attorneys is not irrational" (Pet. App. 9a) and that Congress could not have intended such a result. The court also noted that attempting to calculate the "fees" of *pro se* litigants —including attorneys — on the basis of the value of the work they had allegedly forgone would present great practical problems (*ibid.*).

2. In *Barrett* v. *Bureau of Customs*, 651 F.2d 1087 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982) (No. 81-5633), this Court declined to consider a claim that the attorney's fee provision of the Privacy Act, 5 U.S.C. 552a(g)(3)(B), which is essentially identical to the attorney's fee provision of the FOIA, authorizes an award to a *pro se* litigant. Petitioner suggests no reason why the Court, having declined to review *Barrett*, should consider his claim. The question whether *pro se* litigants who are attorneys are eligible for fees is of significantly less practical importance than the issue presented in *Barrett*, since *Barrett* concerned the eligibility of all *pro se* litigants for fees. And as the court of appeals noted, all of the arguments against awarding attorney's fees to *pro se* litigants who are not lawyers apply equally to petitioner. There is no reason to believe that Congress intended to establish a special rule for *pro se* litigants who happen to be attorneys.[1]

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[1]Petitioner incorrectly asserts (Pet. 11) that the claimant in *Barrett* was a prisoner. The court of appeals' opinion reveals that Barrett was at one time an employee of the United States Customs Service (651 F.2d at 1088) but does not otherwise discuss her status. Indeed, the court of appeals' opinion does not deny that Barrett gave up other potentially gainful activities in order to pursue the Privacy Act litigation.

a. As we explained in our Brief in Opposition in *Barrett*,[2] both the language and the legislative history of attorney's fee provisions like that of the FOIA preclude the award of attorney's fees to *pro se* litigants. Nothing in the language or legislative history suggests that an exception should be created for *pro se* litigants who are attorneys.

All litigants, whether or not they are represented by attorneys, expend time and energy — often substantial amounts of both — in connection with the litigation in which they are involved. They may also aid their own cause by bringing to the litigation particular skills or abilities. But Congress did not intend to reimburse FOIA litigants for such expenditures of their own time, energy, and skill. Congress expressly limited awards to "reasonable attorney fees and other litigation costs reasonably *incurred*" (5 U.S.C. 552(a)(4)(E) (emphasis added)). *Pro se* litigants can recover out-of-pocket litigation costs under this provision, because those are "costs" that they actually "incurred." But they should not be able to claim attorney's fees, because they did not in any sense "incur" or pay such a "fee." "If attorney fees may be awarded to litigants regardless of whether those fees were actually incurred, the award becomes something of a cash bonus to a successful litigant as well as a financial penalty to the defendant government agency." *Cunningham* v. *FBI*, 664 F.2d 383, 385 (3d Cir. 1981) (footnote omitted).

Because petitioner "incurred" no attorney's fees, he is, under the "plain and unambiguous language" of the statute (*United States* v. *Rutherford*, 442 U.S. 544, 551 (1979)), ineligible for an award. The attorney's fee provision of the FOIA, like other waivers of sovereign immunity, creates liability only in those circumstances that are " 'unequivocally expressed' " (*United States* v. *Mitchell*, 445 U.S. 535,

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[2]We have sent a copy of that brief to petitioner.

538 (1980), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)), and its " 'limitations and conditions * * * must be strictly observed' " (*Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)). See also *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947).

The legislative history of the FOIA reinforces the conclusion that it is not intended to allow attorney's fees to *pro se* litigants. The FOIA attorney's fee provision was added not to compensate litigants for all the costs of litigation but to remove "barriers * * * insurmountable for the average person requesting information" (S. Rep. 93-854, 93d Cong., 2d Sess. 17 (1974)). The committees considering the provision noted that "[f]ew individuals can afford the expense of litigating a suit under the Freedom of Information Act" (H.R. Rep. 92-1419, 92d Cong., 2d Sess. 13 (1972)), because cases were likely to "involve[] legal expenses of over $1,000" (S. Rep. 93-854, at 18). As petitioner recognizes (Pet. 18), this legislative history reflects no intention to compensate *pro se* litigants. Moreover, Congress's concern with obstacles that effectively preclude litigation by all but the wealthy does not warrant such compensation because, as the Third Circuit has pointed out, the burdens of *pro se* litigation are seldom prohibitive: "[T]he difficulty and effort involved in proceeding *pro se* * * * cannot be said * * * [to] entail[] the same financial liabilities as those borne by one who retains an attorney and becomes indebted for substantial sums of money." *Cunningham*, 664 F.2d at 386.

An FOIA litigant who is an attorney, like any other litigant, can seek to retain another attorney as an alternative to representing himself. If his claim is meritorious, the attorney's fee provision of the FOIA increases the likelihood that he will be able to find another attorney willing to represent him. As the court of appeals noted, Congress wanted to encourage plaintiffs to retain attorneys because a

pro se litigant may lack "the objectivity and detachment that an outside attorney can provide" and that in turn helps prevent "groundless or unnecessary litigation" (see Pet. App. 3; *Cunningham*, 664 F.2d at 386; *Barrett*, 651 F.2d at 1089-1090; *White* v. *Arlen Realty & Development Corp.*, 614 F.2d 387, 388 (4th Cir.), cert. denied, 447 U.S. 923 (1980)). This reason applies with no less force when the *pro se* litigant happens to be an attorney; attorneys are not immune from the human tendency of other plaintiffs to be excessively enthusiastic and uncritical about their own causes.

Finally, as the court of appeals noted, and as several other courts have pointed out, determining the proper "fee" to award a *pro se* litigant is likely to prove an intractable task, no matter what the litigant's occupation. See, *e.g.*, *Cunningham*, 664 F.2d at 386; *Crooker* v. *United States Department of Justice*, 632 F.2d 916, 921 (1st Cir. 1980). Petitioner suggests, for example (see Pet. 29-30), that in awarding attorney's fees a court should attempt to assign a dollar value to the leisure time the *pro se* litigant has given up and the "opportunities" he has relinquished (see Pet. 29-30). It is readily apparent that any such value would be wholly speculative.

Moreover, several courts have noted the danger that potential litigants might find *pro se* FOIA litigation more profitable than the activities they must forgo to engage in such litigation, with the result that allowing attorney's fees would create a "cottage industry" in *pro se* litigation. See, *e.g.*, Pet. App. 9a; *Crooker* v. *United States Department of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980). This danger is at least as great in the case of *pro se* litigants who are attorneys. An attorney who is not working to capacity might easily decide to fill his docket by "retaining" himself to prosecute FOIA claims, in the hope that lucrative litigation will result. Congress plainly did not intend to create

such a full-employment program for attorneys when it enacted the attorney's fee provision of the FOIA.

b. All but one of the courts of appeals that have considered the issue have agreed that *pro se* litigants are not eligible for attorney's fees under the FOIA and similar provisions of other statutes, and all but one have refused to distinguish between *pro se* litigants who are attorneys and those who are not. See, *e.g.*, *Pitts* v. *Vaughn*, 679 F.2d 311 (3d Cir. 1982); *Clarkson* v. *IRS*, 678 F.2d 1368 (11th Cir. 1982); *Cunningham*, *supra*; *Crooker* v. *United States Department of Justice*, *supra*; *White* v. *Arlen Realty & Development Corp.*, *supra* (*pro se* attorney litigant denied award); *Davis* v. *Parratt*, 608 F.2d 717 (8th Cir. 1979); *Hannon* v. *Security National Bank*, 537 F.2d 327 (9th Cir. 1976); *Burke* v. *United States Department of Justice*, 559 F.2d 1182 (10th Cir. 1977), aff'g 432 F. Supp. 251 (D. Kan. 1976). See also *Kuzma* v. *United States Postal Service*, No. 83-6221 (2d Cir. Jan. 3, 1984); *Crooker* v. *United States Department of the Treasury*, *supra*.[3]

Petitioner correctly asserts that the District of Columbia Circuit permits attorney's fee awards to *pro se* litigants generally. See, *e.g.*, *Crooker* v. *United States Department of the Treasury*, 663 F.2d 140 (1980); *Cox* v. *United States Department of Justice*, 601 F.2d 1 (1979); *Holly* v. *Acree*, 72 F.R.D. 115 (D.D.C. 1976), aff'd *sub nom. Holly* v.

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[3]The Second Circuit has "held out the possibility" that attorney's fees "might" be awarded to *pro se* litigants who had to forgo an opportunity to earn their regular income in order to pursue the litigation (*Kuzma*, slip op. 823) but has held that fees would not be awarded to any persons, whatever their occupations, who made "no showing that prosecuting their lawsuits caused them to divert any of their time from income-producing activity." *Crooker*, 634 F.2d at 49; see *Kuzma*, slip op. 823.

Chasen, 569 F.2d 160 (1977) (table); *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (1977). A divided panel of the Fifth Circuit has recently held that, although that circuit denies attorney's fees to *pro se* litigants generally, *pro se* litigants who are attorneys can recover attorney's fees. *Cazalas* v. *United States Department of Justice*, 709 F.2d 1051, 1055-1057 (1983).

But a conflict in the circuits existed when this Court denied certiorari in *Barrett* (see 81-5633 Br. in Opp. 7-8) and, as we noted above, the question presented by this case is even less worthy of this Court's attention than the issue that the Court declined to review in *Barrett*. There are few reported cases dealing with the question whether *pro se* litigants who are attorneys are entitled to attorney's fees under the FOIA and other statutes, and in our experience the issue seldom arises. Moreover, the amounts involved in these cases are characteristically very small.

If, as the Fifth Circuit suggested in *Cazalas* (see 709 F.2d at 1056-1057), awards are limited to those *pro se* attorney litigants who take time away from income-producing legal work in order to pursue their own FOIA claims, that will further reduce the number of cases affected by the question presented here. Indeed, as petitioner recognizes (see Pet. 22), it is well established that any litigant who has a commercial interest in the outcome of an FOIA case should not recover attorney's fees unless other factors strongly militate in favor of an award of fees (see, *e.g.*, *Blue* v. *Bureau of Prisons*, 570 F.2d 529, 533-534 (5th Cir. 1978); *Nationwide Building Maintenance, Inc.* v. *Sampson*, 559 F.2d 704, 712-716 (D.C. Cir. 1977); *Polynesian Cultural Center, Inc.*, v. *NLRB*, 600 F.2d 1327, 1330 (9th Cir. 1979); S. Rep. 93-854, at 19); since most attorneys will not divert time from a profitable law practice to engage in *pro se* litigation from which they can gain no commercial benefit, that diminishes even more the number of cases in which a *pro se* litigant who

is an attorney will actually be able to recover fees even under petitioner's approach. See, *e.g.*, *Fenster* v. *Brown*, 617 F.2d 740 (D.C. Cir. 1979) (denying fees on remand from *Cuneo* v. *Rumsfeld*, *supra*, because of attorneys' commercial interest).

For these reasons, we have not sought review of the District of Columbia Circuit's decisions in this area, and we have decided not to seek review of *Cazalas*. We note that neither the District of Columbia Circuit nor the Fifth Circuit has considered these issues en banc, and the two active Fifth Circuit judges who were members of the *Cazalas* panel disagreed on the question whether *pro se* litigants who are attorneys are eligible for fees. For these reasons, we believe that review of the issue by this Court is not warranted at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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